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No. 77-7

In the Supreme Court of the United States

OCTOBER TERM, 1977

JO C. DEAL, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners brought this action in the United States District Court for the Western District of Arkansas under the Federal Tort Claims Act, 28 U.S.C. 1346(b), alleging that the crash in Arkansas of a private aircraft, in which six persons died, was caused by the negligence of air traffic controllers employed by the United States (Pet. App. 20-21). The district court found that the crash resulted from pilot error (Pet. App. 28):

> [In descending to land, the pilot] failed to make the final approach properly and instead of going around again, elected to make a sharper turn than was usual. In doing this, he lowered the left wing so sharply it caused the plane to stall and crash.

The court carefully considered eight separate allegations of negligence made by petitioners and concluded, in each instance, either that there was no negligence on the part of air traffic controllers or that any such negligence was unrelated to the crash (Pet. App. 28-37). The court of appeals affirmed *per curiam*, stating that "[o]ur examination of the record satisfies us that [the district court's] detailed findings are supported by substantial evidence and that [its] decision was not induced by any erroneous view of the applicable law" (Pet. App. 39). Petitioners contend that, in finding that the air traffic controllers committed no actionable negligence, the district court applied an incorrect standard of care.

But petitioners misapprehend the standard of care actually applied by the district court. Petitioners argue (Pet. 6-7) that the district court held that the air traffic controllers' only duty was to give the pilot the assistance he requested. But the court's statement upon which petitioners rely related only to one of petitioners' many allegations of negligence (Pet. App. 32):

> In emergency situations, controllers are to give distressed planes priority to the extent consistent with the rules governing separation of aircraft and to give the pilot any assistance which he requests. * * * Here [the air traffic controller] gave [the pilot] clearance as expeditiously as possible. In other words, [the air traffic controller] gave [the pilot] the exact assistance which he requested. No other duty is or should be imposed on controllers.

Not even this passage limits the applicable duty of care in the manner petitioners suggest.

In other contexts, moreover, the district court indicated that an air traffic controller may have an affirmative duty to supply information or guidance beyond that

requested by the pilot. The court stated, for example, that an air traffic controller in some circumstances has a duty to advise a pilot concerning weather conditions (Pet. App. 34-35). In addition, the court observed that "[a] controller is also required to exercise his best judgment" (Pet. App. 35) and must sometimes solicit relevant information from the pilot (Pet. App. 31-32). It therefore is clear that the court did not restrict the air traffic controllers' duty to passive responses to requests. Indeed, the standard of care imposed by the district court does not appear distinguishable from the standard of care applied in other similar cases.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1977.

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[1]In the cases petitioners cite, the courts found that air traffic controllers had breached a duty of care of failing to warn pilots of dangers that were known to the controllers but unknown to the pilots. In *Gill* v. *United States*, 429 F. 2d 1072 (C.A. 5), and *Ingham* v. *Eastern Air Lines, Inc.*, 373 F. 2d 227 (C.A. 2), certiorari denied *sub nom. United States* v. *Ingham*, 389 U.S. 931, for example, the controllers failed to give the pilots accurate or updated information about weather conditions that the planes were about to encounter, thereby breaching a duty of care specifically imposed on the controllers by the FAA Procedural Manual. In *Yates* v. *United States*, 497 F. 2d 878 (C.A. 10), *Hartz* v. *United States*, 387 F. 2d 870 (C.A. 5), and *United States* v. *Furumizo*, 381 F. 2d 965 (C.A. 9), the controllers gave instructions to the pilots of small planes to land or take off directly in the paths of larger, commercial planes; the smaller planes encountered wake turbulence from the larger planes that caused them to crash. By contrast with these cases, there were no conditions relevant to the flight at issue in this case that could or should have been communicated to the pilot.